

No. 2896

United States
Circuit Court of Appeals
For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Appellant,

VS.

W. J. REID,

Appellee.

Petition for Rehearing

Upon Writ of Error to the United States District Court for the
Eastern District of Washington, Northern Division.

CHARLES S. ALBERT,
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Appellant hereby petitions the court for a rehearing and reargument before the court, and for a reconsideration by the court of this cause, on the grounds that the court fell into manifest error of fact in the decision of said cause, which error of fact appears in the record and materially affects the decision; that the court, as shown by its decision, overlooked an important aspect of the case; that the court erred in its decision; that the judgment which the court has affirmed does not conform to the opinion which the court has rendered.

The court in its opinion says:

"As we have seen, no conceivable fraud has been established. That appellee did receive a shock from being thrown against the sink, resulting in some distress to himself, can scarcely be questioned. At that time he was not afflicted with an inguinal hernia on his left side. The following day he experienced pain in that region of his person, and later the hernia developed so that it became well defined. That he was so afflicted on February 26, 1916, is shown by Dr. Downs, who is corroborated in this by Dr. Longeway and Dr. Marshall. So it appears reasonably clear and certain that the development of this particular trouble began at least about the time of the accident, and that he was then afflicted in a way that was not known to him, and which for that reason was not disclosed to the physician, and consequently not taken into consideration when he settled with the claim agent and gave the release. We think that, under the authorities, there is here sufficient to impeach the settlement in so far as it relates to this phase of the controversy, and to that extent the release should be set aside.

"We agree with the court below that it should not be disturbed as it respects the injury to his foot."

From this it is apparent that the court has found that with the exception of the left inguinal hernia, the release should stand, but as to that it should be set aside.

The decree which the court affirmed was as follows:

"That the release set forth in the complaint herein be and the same is hereby upheld and sustained in so far as it purports to release any and

all claims for damages for injury to the right foot and for injuries to the arm and shoulder.

“IT IS FURTHER CONSIDERED, ADJUDGED AND DECREED, that said release be and the same is hereby canceled, annulled, set aside and held for naught in so far as it purports to release any claim for damages for other injuries complained of and set forth in the complaint herein.”

(Tr. 94).

The injuries claimed in the complaint are as follows:

“That as a direct and proximate result of said car leaving the track and your orator being violently thrown about said car, and said top of said cook-stove falling upon your orator’s foot, your orator has suffered a double inguinal hernia, a broken arch of the right foot, a severe wrench of the back and a severe shock to his nervous system. That since said injuries your orator has suffered great and excruciating physical pains and agony and on account thereof has suffered a semi-paralyzed condition of both legs. And your orator does suffer and in all probability will continue so to suffer during the rest of his natural life.”

(Tr. 4).

Under the decree affirmed, it is possible for the plaintiff to recover for the alleged severe wrench of the back and severe shock to his nervous system, great and excruciating physical pains and agony, and for the alleged semi-paralyzed condition of both legs.

This court has found that there is but one injury for which the plaintiff can recover, to-wit, the left

inguinal hernia. Yet it has affirmed a judgment which will allow recovery for a number of other injuries.

A rehearing should be granted, or at least the judgment of the lower court should be modified to conform to the opinion of this court, and the judgment as rendered should not be affirmed in its present condition. The judgment should be modified under the opinion of the court,—if a rehearing be not granted,—so that it be determined:

“That the release set forth in the complaint herein be, and the same is hereby upheld and sustained, except insofar as it purports to release any claim for damages for the left inguinal hernia, and to that extent it is hereby canceled, annulled, set aside and held for naught.”

We respectfully submit that a rehearing be granted, or that the judgment herein be modified to the extent indicated.

CHARLES S. ALBERT,
THOMAS BALMER,
Attorneys for Appellant.

I hereby certify that the foregoing petition for rehearing is in my judgment well founded and is not interposed for delay.

Charles S. Albert
att. in all court.